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FINANCING MUNICIPAL IMPROVEMENTS IN VIRGINIA: A NEEDED CONSTITUTIONAL AMENDMENT.*

Perhaps there is no subject of public concern in America which has received more attention in the not distant past than that of city government. The great development of urban life, as shown by the fact that the larger centres contained a third of the total population of the United States in 1900 as against a thirtieth in 1790; the extension of that life by improved and still improving methods of transportation and communication; the broadened scope of its activity, in achieving which it has expanded from a mere political unit exercising certain police powers to its present position as the guardian of its people's health, the protector of their property, the provider of many of the great services, such as education, water supply, frequently light, often recreation, occasionally transportation, and many others;—these conditions have long impressed thoughtful men with their compelling importance.

The very rapidity of this development, however, caused it far to outrun the means provided for its regulation. For many years the American city was like the boy whose physical strength has outstripped his mental capacity and his experience; and, like the boy, the city became an easy prey. So true is this that in Bryce's "American Commonwealth," that sympathetic observer declares that "there is no denying that the government of cities is the one conspicuous failure of the United States," and that it is "admittedly the weakest point of the country."

But these words were written more than twenty-five years ago; and at that time and for many years before, the abuses of city government had enlisted a growing number of zealous and devoted seekers after better things. After the exposure of the

*A paper read before the Virginia State Bar Association at its annual meeting at White Sulphur Springs, West Virginia, August 5, 1915.

Tweed Ring in New York City, and certain other notorious scandals, direct theft became less popular, and the grosser abuses in part disappeared.

There succeeded, however, a period of magnificent inefficiency. Into the causes of this it is unnecessary to go. But the belief became more or less general that it was in large part due to the cumbrous forms of city government that generally obtained, which were for the most part modelled, with infinite ineptitude, upon the typical structure of the national and state governments; the fact being overlooked that by far the greater part of a city's legitimate activities should lie along business rather than governmental lines. An innovation successfully tried in Galveston, following its calamitous visitation, of a purely business form of government, was eagerly seized upon; and from that time the study of forms of municipal government was pushed forward with incredible rapidity. It may be safely said that the introduction of commission government in Galveston in 1901, and that of the City Manager plan in Staunton in 1908 are the two great milestones in the development of modern municipal forms of government.

The interest thus displayed in forms of government—in defiance of the oft-quoted sneer of Pope—was extended to many other municipal questions. City planning; public baths and play grounds; municipal art commissions; civic centers, alluringly depicted by imaginative architects; arrangements for the distribution of the city's food supply;—such are a few of the by-products, as it were, of the increased interest in municipal affairs.

It may be doubted, however, whether with all the study so lavishly bestowed upon other aspects of municipal activity, there has not been neglected, comparatively speaking, the vital question of finance. Certainly there is hardly any municipal function less standardized. It is true that, as a comparatively recent development, there has come to pass, in the better managed cities, something approaching a recognized accounting system, but there financial standardization stops. Public improvements are paid for diversely from current revenues, by the proceeds of lump-sum assessments, by annual assessments, by the proceeds of long-term bonds, by bonds maturing annually, and in any other way that the casual whim of the governing body from

time to time, and the hodgepodge of laws under which the particular city is operating, may dictate or permit.

With the causes of this relative neglect of a subject so vital, we are only incidentally concerned. Probably the chief is the popular conception of finance as a highly technical subject. The tedium of a discussion of ways and means is, doubtless, another reason. A third may be the relative magnitude of the amounts involved. The maxim *omne ignotum pro magnifico* works both ways.

Yet, whether technical, tedious, or staggering, the growing importance of the subject insistently demands recognition and attention. In an interesting and suggestive article on "Cities" in the Cyclopedia of Political Science, written by Mr. Simon Sterne about 1881, the author calls attention to what he calls the "startling fact" that the total bonded indebtedness of American cities in 1880 was $682,096,460, or rather more than five times what it was in 1860. In the generation that has since elapsed, this indebtedness has more than trebled, and the debt of the City of New York alone exceeds the figure just stated as representing the entire bonded indebtedness of all the cities in the United States in 1880. In the same period, the United States, notwithstanding its enormous expenditures for the Panama Canal, has cut its indebtedness about in half, and the State of Virginia has reduced the burden of its obligations by about twenty-five per cent. That this contrast should exist is natural, when we have regard to its causes; that the contrast should be so violent impels examination and consideration.

It is the purpose of this paper to offer some ideas on the subject of city finance as involved in the subject of public improvements in cities, and especially streets, which are the most usual form of such improvements, and largely typify others.

It is obvious that any proper method of financing an improvement of this character should combine at least four principles, namely:

First, it must be legal. Considerations both of present necessities and future credit imperatively dictate the avoidance of any system open to serious attack.

Second, it should be fair. The incidence of the burden should be in the right place.

Third, it should be conservative. The value of the improvement, from time to time, should reasonably represent the indebtedness incurred for it. This is really only another way of saying that the system should be fair, for, as we shall see more fully hereafter, any other system would put the burden of improvements, in part, upon a generation which has not enjoyed them.

Fourth, it should be practical; that is to say, any securities issued should be attractive to the class of persons who would naturally invest in them.

Let us consider how far these principles are observed in Virginia, and the working of the system now in force.

Except in the instances, comparatively rare, when a street improvement is paid for out of current revenue, the funds for making it are provided for by the issuance of general bonds running usually for thirty years, occasionally less, sometimes more. Sinking fund provisions vary, but are by no means uniformly, if they are generally, adequate to discharge the principal at maturity.

The average life of paving may be put at fifteen years. Assuming thirty year bonds to be issued, it results that at the end of the first fifteen years another bond issue must be made to provide for repaving the street. At the end of thirty years, the city has one bond issue due, another outstanding with fifteen years to run, and a third one immediately pressing for consideration to provide for the new paving necessary, while on the asset side of the ledger there are two worn out streets—value nil—and such a sinking fund as has grudgingly been created. Such a system in the case of a business corporation would spell bankruptcy.

But this is by no means all the story. The bond issue is carried by the city at large. Whether the street be the most travelled thoroughfare in the city, or whether it intersect a suburban district founded on credulity and maintained on optimism; whether it serve the multitude or the few; whether its paving add nothing to the values of abutting property, or create those values;—in each case, the public purse pays the piper.

Such a system is not fair, as the cost is not properly distributed; it is not conservative, as it accumulates liabilities against ever diminishing assets; it is not practical, as it keeps the bonded

indebtedness pressing hard upon the heels of the bond-issuing limit and so impairs the marketability of the bonds. The bond-issuing limit itself is far too liberal. By the Constitution of 1902 it is fixed, except as to pre-existing charters, at eighteen per cent of the assessed value of the real estate in the city. Under the savings bank laws of New York and New England, those banks are forbidden to invest in the securities of cities whose bond issues exceed varying percentages, never more than seven, of assessed municipal property values; and the result follows that this most important class of customers is forced out of the market for our municipal securities.

It might be expected that the consequences of such a system would be striking; and the expectation will not be disappointed.

Taking our two principal cities of Richmond and Norfolk, the latest State and City Section (published Nov. 21, 1914) of the "Finance Chroincle" fails to disclose, with two exceptions—Omaha, Neb., and Yonkers, N. Y., as to each of which somewhat special circumstances exist *—a single city in the entire United States, within a limit of population, as given by the 1910 census, ten thousand in excess of that of those two cities respectively, whose net direct bonded indebtedness is so large. There may possibly be a few instances where bonds issued by school districts containing or contained by cities would bring up the total to that of the Virginia cities referred to; but these are not city bonds proper; and such instances, if they exist at all, are few. Moreover, in the generality of cases, the disparity is very great. For various reasons, among the more important of which are inadequate sinking funds and the practice of issuing bonds of too long maturities—of which more hereafter—Southern cities are generally bonded far more heavily in proportion to population and assessed values than Northern; and

*Approximately half the debt of Omaha is for a water system reported to be paying over ten per cent on the investment. In proportion to property values Omaha's debt is not very high. Most of the debt of Yonkers has been arranged to mature serially with an unusually short average life, and these bonds are required by law to be paid off as they mature. The figures given include a large water debt, which represents income producing property, and likewise include a large amount of revenue bonds and certificates of indebtedness, which are not counted against the bond limit.

therefore, when we find that Richmond has a larger indebtedness than any other Southern city, regardless of size, except New Orleans, and that Norfolk's indebtedness is only exceeded in the South by New Orleans, Richmond, Louisville, and Houston, we feel that we should pause and consider.

Not only is this true, but the results of this unscientific system of financing are manifested in another way. It is generally recognized that municipal indebtedness may be created with entire propriety for remunerative public service enterprises, such as water and lighting systems, docks, or ferries—to mention a few. From an interesting article by Mr. LeGrand Powers, of the Census Bureau, in the National Municipal Review for January, 1914, we learn that of the total debt in 1911 of American cities of over 30,000 population, 33 1-3 per cent was incurred for such public service enterprises. Of the indebtedness of Richmond only 21.7 per cent of the net debt was incurred for such enterprises, while in Norfolk the proportion is only 13.7 per cent, though in the latter case it is fair to say that it is probable that the accounts have not been kept so as fully to disclose the real situation* In other words, our principal cities not only have too much debt, but the debt represents too large a proportion of non-remunerative investments.

The conclusion should not be too hastily formed that there is

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*The figures are as follows:

Richmond (Figures given by City Auditor)		
Total bonded debt		$15,048,055.00
Sinking fund		3,392,825.00
Net debt		11,655,230.00
Water Works Bonds	$1,811,000.00	
Gas Works Bonds	724,068.00	
Total for remunerative purposes	2,535,068.00,	or 21.7% of net debt.
Norfolk (Figures from "Financial Chronicle" Report)		
Total bonded debt		$9,143,550.00
Sinking fund		1,240,308.00
Net debt		7,903,242.00
Water Works Bonds	$1,080,000.00,	or 13.7% of net debt.

anything essentially unsound in the financial position of either of these cities. The contrary is true, as amply attested by the ready sale of their bonds on a favorable basis. The ultimate security for a city bond is the taxable property in the city, and the solid values in the two cities named are such as to inspire confidence. But that their position is such as to require conservative and scientific treatment, there can be no doubt.

It appearing, then, that the consequences of what we may call the Virginia system are just what might have been expected *a priori* of that system, it remains to inquire what can be done to remedy these conditions. Clearly, if the principles above laid down are sound, the remedy is to be found in the application of those principles. It has been said that the system should be legal, fair, conservative, and practical. How can these requirements be attained?

It is believed that the remedy lies along two main lines.

In the first place, all securities issued by a city should be for a term of years not exceeding the life of the improvement for which they are issued, and provision should be made whereby the securities so issued will be automatically retired at maturity. This can be accomplished as to each bond issue, either by creating a sinking fund that will pay off the issue when due, or by issuing what dealers in municipal securities call "serial bonds," by which are meant bonds some of which fall due and are paid each year during the life of the issue, until all are paid. It would be wholly impracticable, within the limits of this paper, to discuss the question which of these two methods is the more advisable, or the further question whether the amortization charges, under either system, should be equal or graded, and, if graded, how. * Suffice it to say that there is no legal or con-

*Much admirable work has been done on this subject. Those interested can profitably consult the Report of the Committee on State Finances of the New York Constitutional Convention now (August, 1915) in session; a paper by Mr. Andrew Wright Crawford of the Philadelphia Bar, in the National Municipal Review for July, 1914; and a paper in the Trust Company Magazine for July, 1915, by Mr. H. F. Beebe, Manager of the Municipal Department of Messrs. Harris, Forbes & Co., of New York. For Mr. Beebe's valuable aid, by conference and correspondence, in the preparation of this paper, acknowledgment is here gratefully made.

stitutional objection to the immediate adoption of this principle by our Virginia cities as to their future bond issues. As to existing indebtedness, steps should at once be taken so to re-adjust the sinking fund provisions as to retire the bonds as they severally mature.

It would be difficult, however, for our Virginia cities, under existing conditions, to provide the very high amortization charges that would be required for street improvements under such a method, unaided as they are by any contributions from the persons principally benefited by the improvements made. And this leads to a consideration of the second of the lines along which relief is to be sought, which involves the placing of the burden of such improvements where it belongs, or, in other words, making the financial system fair.

This can be accomplished, it is confidently believed, only by the re-introduction in Virginia of a system of local assessments; and it is with this subject that this paper is principally concerned.

Prejudice against such assessments long existed in Virginia, and it was in great part justified by the unscientific manner in which they were imposed. They were not infrequently made in lump-sum amounts, whereby the entire amount assessed against the abutters was immediately made a lien on his property—a method burdensome in the extreme. Even when payable in instalments, the instalments did not extend over a sufficient length of time properly to distribute the burden. And moreover, so far as available information goes, the cost of the improvement was usually divided between the city and the abutting owner in a proportion inflexibly fixed in each city regardless of the character and location of the street to be improved.

Yet, not only in Virginia, but generally, local assessments constitute the historical means of acquiring local improvements. Their development, and the evolution lending to the assumption by the city at large of some functions now universally regarded as matters of municipal concern, are so interestingly and succinctly traced by Mr. Sterne, in the article alluded to above, as to justify quotation. He says:

> "Almost all the larger expenditures of a city government, the consequences of which are imposed as a burden upon prop-

> erty by way of assessment, were in times not very remote, borne by property owners without calling upon the government to perform that function for them. Not a century ago most of the cities of Europe were not lighted, and persons who desired to enjoy the luxury of a light at night in the streets, either employed servants to walk before them with torches; or, if they wished to afford easy access to their houses at night, they employed servants to stand with torches or hung up lamps before their houses after sundown. When the desire for lighting became general, the character of this service of function was not changed, only instead of each particular property owner bearing his own expense, the city was uniformly lighted, and the expense borne evenly between the owners of property. At first it was only a few streets that were thus lighted, and the expense borne by the inhabitants of those streets. And thus with paving, sewering and other matters strictly appertaining to the management of real estate, as contradistinguished from governmental functions."

A proper system of local assessment for streets would require, first, the ascertainment by some competent authority of the proper division of the cost of the paving as between the property owner and the city. It is clear that this should greatly vary. In suburban sections the street is almost entirely for the benefit of the abutter, and the assessment should be high—say from 75 per cent to 90 per cent of the cost. Contrariwise, in the case of downtown thoroughfares, the street is primarily for the benefit of the city at large, and the city's share should be high, the property owner contributing only, say from 10 per cent to 25 per cent. In either case, the assessment should be made in instalments, not necessarily equal, continuing approximately through the life of the improvement, with an option to the abutter to pay, if he desires, the whole amount in cash with a suitable discount.

The portion of the cost not provided for in this way would, of course, be borne by the city at large; and, as we shall hereafter see, the preferable method of financing the improvement is for the city to issue bonds covering the entire cost, looking to the local assessments for its *pro tanto* reimbursement. The term of the bonds so issued should be regulated by the principle above laid down.

Such a system would not be burdensome to the abutter, and

the city at large would be infinitely the gainer. Amortization charges would be, in large part, provided for; each improvement would be paid for by the time its usefulness ended; and outstanding bond issues would relatively decrease, and would approach a proper limit.

But to bring about this result a constitutional amendment is necessary. Section 170 of the Constitution, in part, provides that:

> "No city or town shall impose any tax or assessment upon abutting land owners for street or other public local improvements, except for making and improving the walkways upon then existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting land owners. Except in cities and towns, no such taxes or assessments, for local public improvements shall be imposed an abutting land owners."

It is apparent at a glance that this clause operates as a practical interdict against local assessments. In the country it is absolute. In the cities such assessments can be made only for sidewalks on existing streets, existing alleys, and sewers. No such assessment can be made for opening, grading, curbing, guttering, or paving the roadways of any streets, whether existing or not, or for any improvements except the very limited classes named.

Virginia is the single State in the Union that has a provision of this kind. The courts of South Carolina have held local assessments void; but Virginia alone has, by constitutional enactment, tied its hands as to this vital aid to city finance.

While the purposes of this paper are rather of an economic than a legal character, yet a brief review of the Virginia decisions leading up to this enactment may be of interest, not only as a part of the judicial history of the State, but because those decisions are somewhat illustrative of the course of judicial decision on the subject, and, in addition, exhibit quite plainly both the uses and abuses of the system.

The first reported case is that of *Norfolk* v. *Ellis* (1875), 26 Gratt. 224. In that case an assessment was made by the front-

age method (no difference being made between improved and unimproved lots) for three-fourths of the cost of the paving, the remaining one-fourth to be paid by the city. Payments were permitted to be made in "paving bonds," payable in annual instalments in five years. It appears that this division of the cost was provided for by an ordinance providing a general paving fund, and that theretofore, the whole cost had been assessed against the abutting owners.

The assessment was attacked under the Constitution of Virginia only, the Fourteenth Amendment not being relied on. The court held that the provision that taxes should be equal and uniform applied to revenue taxes only, and not to local assessments; that local assessments were founded on the theory of benefits received; that the question whether a *quid pro quo* had been given was a legislative, not a judicial question; that the frontage method was substantially uniform, and was valid; and that a method whereby the abutter would have been assessed with the cost of the street in front of his property would not have been valid.

Judge Anderson filed a vigorous dissenting opinion, holding that the question whether the assessment exceeded the benefits was a judicial question, and that the frontage method was invalid.

Sands v. *Richmond* (1879), 31 Gratt. 571, involved an assessment for the entire cost of a sidewalk in front of the abutter's property, and resulted, doubtless, from the intimation in *Norfolk* v. *Ellis* that an assessment against the abutter for the cost of the street in front of his property would have been invalid. It was held that the assessment was valid; that the language relied on in *Norfolk* v. *Ellis* was a mere *dictum;* and that even if the method involved should be invalid as applied to the entire street, it was valid as to the sidewalk, in which the abutter had a peculiar interest.

In *Richmond &c. R. Co.* v. *Lynchburg* (1886), 81 Va. 473, an annual special assessment of one quarter of one per cent for water mains was held valid, notwithstanding an exemption in favor of water users.

The first case in the State in which the Fourteenth Amendment was relied on to invalidate a local assessment was that of

Davis v. *Lynchburg* (1888), 84 Va. 861. There the assessment was for street paving purposes, and, by general ordinance, half the cost was assessed against the abutting owners by the frontage system. The amendment was invoked because no provision was made for notice to the property owners of the proposed assessment.

The court treated the amendment rather cavalierly, holding that "all possible notice" had been "given by the progress of the work itself," and that every citizen was "held charged with notice of the public laws;" and stated, moreover, that the question had been decided in *Norfolk* v. *Ellis, supra.* No single one of these statements was correct. The first two were refuted by the present court in the later case of *Violett* v. *Alexandria,* hereafter to be noticed, and the report of *Norfolk* v. *Ellis* fails to disclose that either court or counsel had ever heard of the Fourteenth Amendment. In 1875 the halcyon day for constitutional lawyers had not yet arrived in Virginia when, as Justice Miller almost plaintively said a few years later in *Davidson* v. *New Orleans* (1878), 96 U. S. 97, 24 L. Ed. 616, the Fourteenth Amendment was

> "looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

At any rate, the Fourteenth Amendment had not even in 1888 sufficiently grown in favor with the Court of Appeals to overcome the then settled practice of local assessments, and what the court regarded as the rule of *stare decisis* on the subject.

Davis v. *Lynchburg* marked the high tide of local assessments in Virginia. The cases which we have noticed were cases of assessment for improvements—properly so called—sidewalks, water, paving. *Norfolk* v. *Chamberlaine* (1892), 89 Va. 196, however, involved assessments against abutting owners for the presumed benefits derived from the opening of a street. It appeared that Chamberlaine was the owner of a lot on the corner of Granby and Plume Streets, fronting twenty-three feet on Granby Street and thirty-nine on Plume. The city desiring to widen Plume Street, sought to purchase ten feet of Chamber-

laine's Granby Street frontage (reducing that frontage to thirteen feet), and, failing, acquired it by condemnation for $1,200.00. After the condemnation proceedings were concluded, no notice of any such intention having been given, the idea was conceived of assessing the entire expense of opening the street on the abutting owners, and a committee appointed for the purpose proceeded to effectuate it by blithely assessing against Mr. Chamberlaine the sum of $1,500.00 as benefits from the opening of the street. The net result to Mr. Chamberlaine was that he had ten feet of his Granby Street frontage taken away, and his remaining frontage reduced to the significant, if inutile, number of thirteen feet, for which "benefits" he was to pay the City the net amount of $300.00!

The Court decided, in enjoining the assessment, that the benefits to the rest of the lot could not, under the condemnation statutes then in force be set off against the value of the land taken—a doctrine that had characterized the condemnation laws of Virginia for many years.* This would have ended the case; for if such benefits could not be considered directly in condemnation proceedings, it would have been a mockery to have permitted them to be assessed afterwards, thus accomplishing the same result by indirection. But Judge Richardson went much further in delivering his opinion. He stated that the result of any local assessments was "gross inequality and injustice," and that "the whole system . . . is arbitrary exaction in its most arbitrary form;" that while he would not then pronounce the questioned section of the Norfolk charter unconstitutional, he would be obliged to do so were the question directly presented; that notice of the proposed assessment was essential; and that if necessary, he would overrule the *Ellis, Sands,* and *Davis* cases.

No local assessment was sustained in Virginia from the decision of the *Chamberlaine* case down to the time of the adoption of the Constitution of 1902.

In the next case decided, *McCrowell* v. *Bristol* (1893), 89 Va. 652, doubt was again expressed as to the constitutionality of

*See James River, &c. Co. *v.* Turner (1838), 9 Leigh 313, esp. note at end of Judge Parker's opinion; Mitchell *v.* Thornton (1871), 21 Gratt. 164.

local assessments in general; but, the particular assessment involved being held invalid on other grounds, it was not found necessary to decide the question.

Asberry v. *Roanoke* (1895), 91 Va. 562, involved a paving assessment made by the frontage method and asserted as a personal liability against the abutter. It was held invalid on the latter ground, the question of the validity of the frontage system being expressly left undecided.

The next, and the leading modern case in Virginia on the subject, is that of *Violett* v. *Alexandria* (1896), 92 Va. 561, in which was involved an assessment by frontage for street improvements, the owner being assessed with the entire expense of the sidewalk, and two-thirds of that for guttering and curbing. No notice of the assessment was provided for. The Court held squarely that such assessments without notice were void under the Fourteenth Amendment; that there must not only in fact be notice, but that the law must provide for it; that, under the rule of *stare decisis* such assessments were valid under the State Constitution, except under such circumstances of "gross oppression and injustice" as existed in *Norfolk* v. *Chamberlaine;* and that the frontage method involved in the case was invalid, not having been properly authorized by the legislature in the charter of Alexandria, which contemplated assessments according to benefits received. Whether such a method would have been valid, if clearly authorized, was expressly left open.

Finally, in *Norfolk* v. *Young* (1900), 97 Va. 728, a requirement under the 25th section of the charter of Norfolk, of the publication of a mere resolution to the effect that certain improvements were expedient, was held insufficient as notice affording an opportunity to be heard, and assessments made thereunder were held void.

By this course of decision it is fair to suppose that the friends of local assessments in Virginia were discouraged in measure corresponding to the presumed elation of the enemies of the system. At all events, when the Constitutional Convention, "by an edict more sweeping than the touch of Omar," in Chancellor Kent's phrase, abolished the system root and branch, this was accomplished with no dissenting voice. A cursory

mention in the debates* was all that was given to the destruction of a fiscal system that had at one time been in high favor.

Meantime, a case involving the question, left open in *Violett* v. *Alexandria,* of the validity of the frontage system of assessment, when expressly authorized by the legislature, had been on its way through the courts, and in *Adams* v. *Roanoke* (1903), 102 Va. 53, it was held that assessment by the frontage method did not necessarily infringe upon constitutional safeguards. The decision came, however, after the adoption of the Constitution, and was thus too late to be of practical value as a precedent. Presumably all the proceedings in the case had been taken before the adoption of the Constitution, for in *Hicks* v. *Bristol* (1904), 102 Va. 861, and *Fulkerson* v. *Bristol* (1906), 105 Va. 555, it was decided that proceedings, even if previously initiated, could not be continued, and that assessments thereby made, could not be enforced, after the Constitution went into effect.

It is interesting to note that while the Virginia Court had been, by its course of decision, restricting the power of local assessment, the Supreme Court of the United States was leaning in the other direction. Without any attempt to state the early decisions of that court, we may notice first the case of *Norwood* v. *Baker,* (1898), 172 U. S. 269, 43 L. Ed. 443. That case, it is true, was hailed by those jealous of the power of local assessment as a great victory. In it it appeared that the village of Norwood, Ohio, opened a street, by condemnation, through the plaintiff's property, and thereafter assessed back upon the property the entire amount of the award, together with the cost of the condemnation proceedings. The legislative authority to the village, under which it acted, was to make an assessment *either* in proportion to the benefits received, *or* according to the value of the property assessed, *or* by the front foot of the abutting property. The assessment was in fact made on the frontage basis. The Court, speaking through Justice Harlan, held the assessment invalid, under the Fourteenth Amendment, on the grounds that an assessment substantially in excess of benefits received amounted to a taking of property for public use without just compensation,

*Debates of the Constitutional Convention of Virginia, 1901-2, pp. 2641-2.

and that the assessment called in question had been made with no reference to benefits received. Language was employed that implied a condemnation of the frontage system.

Justice Brewer, Gray and Shiras dissented, the first named filing an opinion in which he called attention to what was the undoubted weakness in the case, namely, that the plaintiff had neither averred nor proved that the assessment was in *fact* in excess of the benefits received; a situation resulting where the court, in order to meet the evident hardship of the case, had been obliged to base its decision on the mere proposition that the *rule* of assessment was erroneous.

The decision had its enemies as well as friends;* and as a precedent for what it was supposed to hold, its glory was short-lived. In *French* v. *Barber Asphalt Paving Co.* (1901), 181 U. S. 324, 45 L. Ed. 879, there came under review an assessment of the entire cost of paving a street upon the abutting owners according to frontage, with no preliminary hearing as to benefits. In an opinion by Justice Shiras (who, it will be recalled, dissented in *Norwood* v. *Baker*), the Supreme Court upheld the assessment; Justice Harlan, the author of the opinion in *Norwood* v. *Baker* (with whom concurred the present Chief Justice and Justice McKenna), dissenting with characteristic vigor. *Norwood* v. *Baker* was restricted to the exact facts therein presented, which, the Court declared, presented "an act of confiscation;" and its reasoning was relegated to the limbo of "old, unhappy, far-off things."

The majority opinion impresses the reader as industrious rather than synthetic, defensive ather than constructive. In the language of Justice Harlan, "it is difficult to tell just how far the Court intends to go." The opinion is made up principally of statements of and excerpts from a large number of cases defining due process of law, most of which illustrate the familiar principle that what is due process must be determined with reference to the particular kind of proceeding involved, and that the settled habit of a government in matters of similar character will not be lightly disturbed. But the Court evolved no rule from the authorities, expressed no principle that might serve as a guiding

*See article quoted from Case and Comment in 6 Va. Law Reg. 367.

star, and in lieu of any conclusions of its own, summed up what it had to say in quotations from Cooley on Taxation and Dillon on Municipal Corporations—quotations, too, which Justice Harlan claimed did not state the views of those learned authors either "fully or correctly." But whatever of intangibility of elusiveness may have characterized the Court's opinion, a great series of other cases argued at the same time and decided on the same day, in each case by a Court divided exactly as on the principal case, tended to solve the question how far the court intended to go; and served to indicate that it intended to go far indeed.

In *Wight* v. *Davidson,* 181 U. S. 371, 45 L. Ed. 900, the Court sustained an assessment upon abutters of one-half of the damages allowed in condemnation proceedings for the land involved in opening a street; in *Tonawanda* v. *Lyon,* 181 U. S. 389, 45 L. Ed. 908, an assessment was upheld of the entire cost of a paving improvement, levied upon abutters by the frontage method, with no provision for an inquiry as to benefits; in *Webster* v. *Fargo,* 181 U. S. 394, 45 L. Ed. 912, the lawful bases of apportionment were extended to include either value or superficial area, as well as frontage; the frontage method was again approved in *Cass Farm Co.* v. *Detroit,* 181 U. S. 396, 45 L. Ed. 914, and in *Detroit* v. *Parker,* 181 U. S. 399, 45 L. Ed. 917, in which last case it again appeared that no provision was made for a hearing as to benefits; in *Shumate* v. *Heman,* 181 U. S. 402, 45 L. Ed. 922, an assessment by frontage, without notice or hearing, for the cost of a sewer was sustained; and in *Farrell* v. *West Chicago Park Commissioners,* 181 U. S. 404, 45 L. Ed. 924, approval was given to an assessment upon abutters of by far the greater part of the cost of "creating and improving" a boulevard in Chicago.

Later decisions have continued the Court's liberal attitude towards such assessments In *Voight* v. *Detroit* (1902), 184 U. S. 115, 46 L. Ed. 459, the assessment was for two-thirds of the cost of opening a street. The complaint was that while a hearing was afforded on the question of benefits, there was no hearing as to what lands should be included in the assessment district. The assessment was sustained. In *Goodrich* v. *Detroit* (1902), 184 U. S. 432, 46 L. Ed. 627, it was held that it was necessary

to give notice only to those whose property was taken, not to those against whom assessments for benefits might be made; the Court remarking that in the case of a public school, benefiting a whole district of a city, it would be "an intolerable burden" to require personal notice to all the taxpayers of that district. An assessment by frontage of three-fourths of the cost of paving a street was sustained in *Chadwick* v. *Kelly* (1903), 187 U. S. 540, 47 L. Ed. 293; and the entire cost of similar paving was held properly imposed on the abutters in *Schaefer* v. *Werling* (1903), 188 U. S. 516, 47 L. Ed. 570, though in that case the Court pointed out that the State Court had construed the State statutes as limiting the assessment to benefits.

Still more recent cases in the Supreme Court upholding the power are noted in the margin.* There is an observable tendency in the direction of deciding cases not so much on fixed principles as in accordance with the effect of the assessment in the particular case. Thus in *Martin* v. *District of Columbia* (1907), 205 U. S. 135, 51 L. Ed. 743, Justice Holmes, after observing that "constitutional rights like others are matters of degree"—a proposition that may be feared to involve the danger of regulating standards by the "length of the chancellor's foot"—and after further observing that "it would be unfortunate if the present act should be declared unconstitutional after it has stood so long," held that a law requiring the entire expense of opening a street to be assessed upon the abutters should be construed so as to limit the assessment to benefits received—a construction apparently dictated rather by considerations of constitutional necessity than by the language of the act—and, it being apparent that the assessment under review had not in fact been so made, quashed it.

From the foregoing review of authorities it is manifest that

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*Hibben *v.* Smith (1903), 191 U. S. 310, 48 L. Ed. 195, with an interesting discussion of due process; Louisville &c. R. Co. *v.* Barber Asphalt Paving Co. (1905), 197 U. S. 430, 49 L. Ed. 819, in which the Court got still further away from the doctrine of benefits, the assessment being made on a railroad right of way; Cleveland &c. R. Co. *v.* Porter (1908), 210 U. S. 177, 52 L. Ed. 1012, sustaining an assessment to be imposed on back lying lots in the event the front lots failed to satisfy it.

with the inhibition of the Virginia Constitution eliminated, there are few practical difficulties in the way of installing in this State a scientific system of local assessments. The Supreme Court of the United States displays far less of jealousy for the Fourteenth Amendment than did our Court of Appeals in the *Violett* case; but that case was decided at a time when the revulsion of feeling against local assessments evidenced by the *Chamberlaine* case had not yet spent its force, and long before the Supreme Court had embarked on the policy of extreme liberality exhibited by the *French* and succeeding cases. It is not unreasonable to suppose that in process of time, on a question under the Federal Constitution, the Virginia doctrine would tend to become assimilated to that of the Supreme Court. In any event, however, the *Violett* and *Adams* cases, even if rigidly adhered to, sufficiently point the way towards the elimination of constitutional perils in local assessment matters, and give assurance that the necessary forward progress may be undertaken with security, so soon as the prohibitory provision shall have been repealed.

For an outright repeal is what is required. Opinions may differ as to the proper framing of local assessment laws—whether, for example, assessments should be made for opening streets as well as paving them, and in such case whether the value of the benefits should be allowed as against the value of the land taken, or merely as against that of the land damaged; by what system assessments should be determined, whether by frontage, values, or how; whether assessments should be preceded by a petition of property owners, and, if so, of what proportion of them; and many other questions that might be enumerated. But these matters should be left to public opinion, as reflected by the legislature. The safe-guards of the Virginia Bill of Rights and the Fourteenth Amendment are adequate. Details should be avoided in constitution-making. It is no rare phenomenon that those most insistent upon creating constitutional restraints are most impatient of them when they make themselves felt. If the people in the rural districts wish to retain the constitutional prohibition against local assessments there, let them do so, though such a course is believed to be unwise for reasons that will be stated; but the cities should be set free from this mistaken and unprecedented restriction that was so lightly adopted.

Otherwise, their position will be hard indeed. The exigent demand for repaving which will soon be felt will result by a species of reaction in partial atrophy of plans for suburban development, except where, as has sometimes been successfully done in Norfolk, the desired result can be accomplished by a large voluntary increase, by the owner, of the assessment for taxation—a method that works fairly well, but is generally impracticable where there are a number of owners to deal with. Our cities will continue to pile up debt; and the generations to come will curse our improvidence.

Should this provision be repealed, a few cautionary words may not be amiss. In framing local assessment laws, the experience of other states should be carefully studied. Particularly in providing for the issuance of securities, legal counsel who specialize in municipal issues should be consulted. It has been said that a system of municipal finance should be practical, so as to be attractive to bond buyers. In no respect is the opposite quality more apt to be displayed than when a legislature or city council attempts, unaided, to authorize a bond issue.

One serious blunder sometimes made deserves special mention in any consideration of the local assessment system as applied to municipal finance. It consists in leaving uncertain the question whether a security issued is predicated on the general credit of the city or on a local assessment, or whether the remedy on the assessment has to be exhausted before the city's credit is looked to. Uncertainty of this kind will greatly injure any bond issue for market purposes. The bond should be either an assessment bond pure and simple with the credit of the city left untouched; or it should be based wholly on the city's credit. The former does not affect the bond-limit, but the latter is more marketable and is believed to be preferable; and proper constitutional provision could and should be made for not counting against the bond-limit such proportion of the bonds as will be paid by the assessment, for of course, in such case the city looks to the assessment for reimbursement, partial or total. The bond-buyer, however, knows only the city in the transaction.

The primary purpose of this paper will have been subserved if a case has been made out for the repeal of the constitutional inhibition against local assessments, thus opening the way for the

installation of that historic system on an enlightened and scientific basis. A proper correspondence between the life of municipal securities and that of the improvements for which they are issued has likewise been urged. Considerations of space and time render impossible a complete treatment of the entire subject of financing public improvements; but mention, at least, should be made of that new but economically sound method known as excess condemnation, whereby the appalling expense of acquiring property, especially in congested districts, can be relieved as to the city while conserving the legitimate rights of the property owner. It is to be hoped that a constitutional amendment embodying this idea may be introduced along with one permitting local assessments, for the two things, while in no way necessarily interdependent, are yet philosophically akin.

It is believed that much of what has been said respecting the financing of public improvements in cities would be applicable, in principle, to the rural districts, where the need of such improvements is scarcely less acute, and the difficulty of providing them is far greater. Not far outside the corporate limits of the City of Norfolk is a bridge spanning a waterway upon the farther shores of which are many beautiful homes. The bridge is a ramshackle structure, unsightly, uncomfortable, almost dangerous. A relatively small assessment upon the great expanse of property that would be benefited would provide an attractive and dignified means of approach, and would be so rapidly absorbed in increased values as not to be felt. Such an assessment being constitutionally impossible, the chance of such an improvement seems remote, and the property suffers accordingly. This is but one instance of hundreds that will readily suggest themselves. But difficulties may exist as to a local assessment system in the country that would not occur in the cities; and it is in the latter that Virginia should first undertake to set her house in order to the end that their financial systems should not lag behind their other notable advances.

For, in the evolving cycles of the years, the cities are coming again into their own. They are the handmaidens of civilization. Far back in the ages, when the concept of nationality was undreamed of, men were building great and splendid cities wherein they might abide for their defense and their delight. We know

of Nineveh and Babylon, of Tyre and Sidon, but only vaguely do we conceive of the countries in which they were. The glory that was Greece found its most poignant expression, not in the Vale of Tempe, but on the heights of the Acropolis; and the grandeur that was Rome was epitomized in the phrase, redolent of civic pride, *civis Romanus sum*—that most concise formula of civil rights known to history. And when that glory and that grandeur had departed, we find Florence and Verona, Venice and Genoa, continuing the great civic tradition. There came, in some important parts of the world, a change. Governmental systems revolving around a landed aristocracy, with small participation in government on the part of the masses—systems such as gave character to England and glorified Virginia in *ante bellum* days—however effective as breeders of great men, were yet species of beneficent oligarchies. They were not favorable to the highest municipal development; and hence for a long time the primacy of the city, under such systems, received a check. But with the advance and more extensive infusion of democracy, ever favorable to city development, the pendulum swung back, and the cities are again the centres of light and learning, of arts and letters, of the glory no less than of the stress of life full to overflowing. In the progress towards the realization of their highest destinies, no phase of government should be neglected, no aspect of administration unstudied. If this paper shall be successful in directing some measure of attention to one of the many problems that press for solution, it will not have been prepared in vain.

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